No. 80-780

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN COMPANIES, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF INDIVIDUAL HOTEL EMPLOYEES IN SUPPORT OF THE PETITIONER

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF INDIVIDUAL HOTEL EMPLOYEES IN SUPPORT OF THE PETITIONER

Mountain States Legal Foundation respectfully moves this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed brief *amicus curiae*. In support of this motion, the Foundation states:

1. Mountain States Legal Foundation, is a nonprofit, membership public interest legal foundation. The Foundation is supported entirely by donations from its members and is dedicated to the legal advocacy of the values and concepts of individual liberties and economic freedom.

2. The named individual hotel employees represented by the Foundation in this *amicus* brief will be directly affected by the outcome of this litigation because they are presently required to pay Social Security taxes on the value of meals provided by their employers.

3. The *amici* have received the consent of both parties to the filing of this brief.

4. Unforeseeable delay was encountered in the preparation of this brief, primarily because of the necessity for gaining approval of the Foundation's Board of Directors and all *amici* to participate in this litigation through the filing of this brief.

5. On March 5, 1981, the Foundation filed a timely request for additional time within which to complete printing and editing of this brief.

6. On March 12, 1981, Mr. Alexander Stevas, Clerk of this Court, informed counsel for the *amici* that the only available means for seeking an extension of time was by addressing this Motion for Leave to File to this Court.

For the foregoing reasons, the Foundation respectfully requests that its Motion for Leave to File the annexed brief *amicus curiae* be granted.

*Respectfully submitted,*

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## BRIEF AMICUS CURIAE OF INDIVIDUAL HOTEL EMPLOYEES IN SUPPORT OF THE PETITIONER

## INTEREST OF THE AMICI CURIAE

The individual *amici* are employees who have had Social Security (FICA) taxes deducted from their wages. One segment of such FICA taxes is paid on the value of meals provided by their employers.

Each of the *amici is* employed by a hotel in Nevada. Kim Aspatore, Peter Aspatore, Virginia Hammond, Sarah Johnson, Donna Milcarek, Jean Miller and Michael Varhola are employed by Circus Circus, Inc., in Las Vegas, Nevada. Daniel J. Becan, John Brawn, Alan K. Johnston, Timothy McRee and Thomas Miller are employees of the Sahara Hotel in Reno, Nevada. In the course of employment, meals are provided to the *amici* by their employers without charge.

The Nevada hotel and casino industry was the subject of a recent Court of Claims ruling on the meal value

issue, *Hotel Conquistador, Inc. v. United States,* 597 F.2d 1348 (Ct. Cl. 1979), *cert. denied,* 444 U.S. 1032 (1980). The Court of Claims ruled that meals provided for the convenience of the employer are not subject to FICA and Federal Unemployment Tax Act (FUTA) taxes. The facts described in the *Hotel Conquistador* decision are similar to those prevailing throughout the industry. Most hotel employers furnish meals to their employees as a convenience to the employer when the employees work a full shift. Meals for service employees are ordinarily served in facilities separate from those frequented by customers.

The convenience of the employer is served in several ways by provision of meals. Short lunch periods (30-45 minutes) are feasible when employees eat on the premises, but not if they must go elsewhere for food. Many hotel employees (including many of the *amici*) are required to wear uniforms on the premises, but are not allowed to wear them while eating elsewhere. In order to enforce this rule, additional time would be necessary for eating off the premises.

Although the provision of meals is an item that has been specified in some union contracts, the hotel managements provide meals for both union and non-union employees. In each of the hotels represented by the *amici,* the Internal Revenue Service has not challenged the assertion that the meals are provided for the convenience of the employer and thus not subject to withholding for income tax purposes. *See Hotel Conquistador,* 597 F.2d at 1350.

The *amici* named herein are not directly affected by applicability of the Federal Unemployment Tax Act, since only employers are liable for the unemployment tax. They are unaffected by FUTA interpretation also because of two practical matters: first, because FUTA tax is imposed only on the first $6,000 of wages; I.R.C. § 3306; which is ordinarily exceeded by full-time employees, even those earning

the minimum wage, and second, because the workers' FUTA benefits are unaffected by the employer's contribution level. *See generally* I.R.C. § 3304. The same legal principles would appear to apply to FICA and FUTA taxes.

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Letters indicating the consent of the parties to the participation of these *amici* will be filed under separate cover with the Clerk of the Court.

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## SUMMARY OF THE ARGUMENT

This Court has already ruled, in *Central Illinois Public Service Co. v. United States*, 435 U.S. 21 (1978), that reimbursement for meals provided to employees are not included in wages for income tax withholding purposes. The *amici* argue that the same result should be reached as to the value of meals for FICA and FUTA purposes, since the relevant definition of wages is virtually identical in all three sections of the Internal Revenue Code. Such an interpretation of the statute would further the goal of simplicity and uniformity in administration of the tax laws for the thousands of employers and employees affected. It is consonant with applicable rules of statutory construction and with past judicial rulings. The *amici* herein will not attempt to reiterate the administrative and legislative history of the Social Security Act that will presumably be fully briefed by the parties. The *amici* will focus on a few legal issues and the underlying public policies.

## ARGUMENT

### I. FUTURE LITIGATION WILL BE AVERTED, AND EASE OF ADMINISTRATION WILL BE FURTHERED, IF INCOME TAX DEFINITIONS ARE ADOPTED FOR F.I.C.A. PURPOSES

The *amici* urge this Court to resolve the meal tax issue in a manner that will engender the least amount of future litigation. For employees, it is exceedingly difficult to challenge FICA tax withholdings on meals. The average amount of FICA taxes paid on meal valuations is small[1] — certainly not worth the expense of individual litigation. The necessity of filing individually computed claims for refund makes a class action alternative inappropriate. Furthermore, litigants must apparently be prepared to pursue their tax cases to this Court in order to obtain a final resolution of the issue — as those who cheered the *Hotel Conquistador* decision discovered when the IRS decided not to acquiesce to the Court of Claims ruling. Thus, it is difficult for employees to resolve their meal value FICA tax liability.

Although the amount for each individual is small, the employee taxpayers are nevertheless concerned about whether such taxes are justified. The right of taxpayers to minimize their tax burdens has long been recognized in the United States. *Knetch v. United States,* 364 U.S. 361 (1960); *United States v. Isham,* 84 U.S. (17 Wall.) 496 (1873). This Court has quoted with approval the classic statement of Judge Learned Hand in *Commissioner*

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[1]Assuming a valuation of even $2.00 per meal (which is higher than the values litigated in any of the recent meal tax cases) for 250 working days per year, taxed at the prevailing rate of 6.5%, an employee's social security tax on the value of meals would be $32.50. ($2.00 x 250 x 6.5% = $32.50.)

*v. Newman,* 159 F.2d 848, 850-51 (2d Cir. 1947) (dissenting opinion):

> [N]obody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions.

*Commissioner v. First Security Bank,* 405 U.S. 394, 398n.4 (1972). Although the Social Security program may have an admirable purpose, the employee taxpayers oppose extension of taxation to cover the value of meals—particularly when these meals are not provided to them for a primarily compensatory purpose.

According to the most recent IRS version of meal taxation, the determinative criteria for taxing benefits is whether the benefits constitute an "appreciable part of income." Rev. Rul. 62-150, 1962-1 C. B. 213. The IRS then posits an unnecessarily broad rule: provision of one free meal a day is a *per se* appreciable part of income. *Id.* This characterization ignores the more meaningful consideration of whether the meals constitute payment for services, and therefore "wages" within the meaning of the FICA, I.R.C. § 3121. It also ignores the fact that the value of meals may vary greatly depending on individual eating habits, and that employees are not compensated for meals they do not eat. Thus employees might currently be expected to pay taxes on meals they did not consume.

The *amici* urge this Court to recognize applicability of the "convenience of the employer" test to the FICA tax. The test is reasonably clear and, more significantly, it has been interpreted in a substantial body of case law. Application of this established test will minimize the amount of future litigation generated in determining whether particular situations are covered by this Court's new rule.

Convenience and simplicity in administration is a commonly recognized consideration in the interpreting of

tax statutes, *Central Illinois Public Service Co. v. United States, supra.* The Court of Claims used this as one factor in determining that the value of meals should be excluded from wages for FICA and FUTA purposes, as well as from the definition of wages for income tax withholding purposes. *Hotel Conquistador, supra.* The court held that the government's attempt to define wages more broadly than income "certainly cannot be commended as facilitating the simplicity and uniformity that are so badly needed when thousands of employers are required to act as deputy tax gatherers from millions of employees." 597 F.2d at 1351.

The convenience of the employer test is consistent with the ordinary meaning of the term "wages." Wages are statutorily defined as "all remuneration for employment . . . including the cash value of all remuneration paid in any medium other than cash . . . ." I.R.C. §§ 3121(a), 3306(b), 3401(a). The commonly understood meaning coincides with the statutory meaning, i.e., that wages are compensation for services performed. The "convenience of the employer" test is rooted in this conception, since meals or lodging provided primarily for the benefit of the employer are not necessarily tendered in exchange for work performed.[2] It is significant that this exclusion from earnings for income tax purposes arose through administrative and judicial interpretation, and was not codified in I.R.C. § 119 until many years later. The basic statutory structure, in particular the definition of wages, is the same under FICA as under the Internal Revenue Code prior to the adoption of Section 119. Thus it would not be improper for the Court to adopt the common law convenience of the employer rule as the judicial construction of FICA wages.

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[2] *Commissioner v. Kowalski,* 434 U.S. 77, 85 (1977), noted that early administrative pronouncements of the convenience of the employer rule were based on the rationale that "benefits conferred by an employer on an employee in the designated circumstances were not compensation for services and hence not income." *See also Jones v. United States,* 60 Ct. Cl. 552 (1925).

## II. THE RULES OF STATUTORY CONSTRUCTION INDICATE THAT THE VALUE OF MEALS AND LODGING SHOULD NOT BE CONSIDERED WAGES FOR SOCIAL SECURITY TAX PURPOSES.

### A. *Ambiguities in FICA tax liability should be construed in favor of the taxpayer.*

Courts have often expressed a rule that the Social Security Act is to be liberally construed in favor of coverage, because the purpose of the old age benefits provision is "to provide funds through contributions by employer and employee for the decent support of elderly workmen who have ceased to labor." *Social Security Board v. Nierotko,* 327 U.S. 358, 364 (1946). *See also Rasmussen v. Gardner,* 374 F.2d 589 (10th Cir. 1967); *Delno v. Celebrezze,* 347 F.2d 159 (9th Cir. 1965). This adage should, however, be exercised with caution. It has primarily developed in the context of lawsuits seeking entitlement to benefits, and operates on the assumption that the Social Security system differs markedly from ordinary taxation. An examination of the circumstances surrounding FICA tax liability reveals that a presumption in favor of the taxpayer is more appropriate.

Recent cases have made clear that payment into the Social Security system does not guarantee the receipt of expected benefits:

> The fact that social security benefits are financed in part by taxes on an employee's wages does not in itself limit the power of Congress to fix the levels of benefits under the Act or the conditions upon which they may be paid. Nor does an expectation of public benefits confer a contractual right to receive the expected amounts.

*Richardson v. Belcher,* 404 U.S. 78, 80 (1971). Although Social Security is more than a welfare program generally benefitting needy persons; *Califano v. Jobst,* 434 U.S. 47 (1977); and although it has some similarities to an insurance program; *Sims v. Harris,* 607 F.2d 1253 (9th Cir. 1979); these considerations are insufficient to justify a strong presumption in favor of Social Security taxation. From a practical perspective, Social Security differs little from an ordinary tax as to both employers and employees. Payment of the tax is mandatory, while receipt of benefits is subject to legislative discretion. *See* 42 U.S.C. § 1304, which specifically reserves congressional authority to amend the program. The worker is not entering into a contractual pension program. Furthermore, the presumption of inclusion in the Social Security system has usually been discussed by courts with regard to entirely including or excluding individuals from the program, not determining the tax liability of already covered individuals. *See, e.g., United States v. Silk,* 331 U.S. 704 (1947); *United States v. Vogue, Inc.,* 145 F.2d 609 (4th Cir. 1944).

Other aspects of the Social Security program have not received the same presumption in favor of coverage. In *Burns v. Alcala,* 420 U.S. 575 (1975), the Court noted that a presumption in favor of eligibility for the Aid to Families with Dependent Children program under the Social Security Act when the statute is ambiguous was a "departure from ordinary principles of statutory interpretation [that] is not supported by the Court's prior decisions." 420 U.S. at 580.

The tradition of interpreting tax statutes in favor of the taxpayer in case of ambiguity is strongly established in American law.

> In the interpretation of statutes levying taxes it is the established rule not to extend their provi-

> sions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.

*Gould v. Gould,* 245 U.S. 151, 153 (1917). *Accord, McFeely v. Commissioner,* 296 U.S. 102 (1935); *Ellis v. United States,* 416 F.2d 894 (6th Cir. 1969).

The *amici* submit that, at least in the narrow situation of taxpayer liability for a small portion of FICA taxes, the presumption of broad inclusion should not apply and should be replaced by the ordinary construction in favor of the taxpayer.

B. *Prior cases support the finding that meals are not wages for FICA purposes.*

An examination of the lower court decisions on the meal tax issue illustrates the rationale for finding meal values to be outside the scope of FICA taxation. *Royster Co. v. United States,* 479 F.2d 387 (4th Cir. 1973), concerned amounts paid to salesmen to reimburse them for the cost of meals purchased by them during the day on the road. The Fourth Circuit recited the definition of wages for FICA, FUTA, and income tax purposes, and concluded "that the slight variations in the wording of the above statutes were inconsequential and that wages has the same essential meaning under all the statutes here in question." 479 F.2d at 390.[3]

The Court added that:

> We are of the opinion that the term wages is narrower than the term income as used in the income

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[3]The court also noted that the government brief expressed agreement with this proposition.

> tax provisions relating to how an individual must treat payments to him. Wages are merely one form of income.

479 F.2d at 390.

A further refinement of the definition of income led the Court to the conclusion that the meals provided by the taxpayer were not wages. The essential element of wage is remuneration for services performed. The employees in *Royster* performed no services in order to be entitled to meals. Instead, lunches were provided to save mileage expenses incurred by employees who drove home for lunch. The statutory "convenience of the employer" test was not relied upon by the court in *Royster,* but its analysis was similar. It found that meals provided for a noncompensatory purpose were not wages.

Another recent case finding that benefits are not wages for FICA and FUTA purposes is *Oscar Mayer & Co., Inc. v. United States,* 623 F.2d 1223 (7th Cir. 1980). *Oscar Mayer* again examined the question of taxation under ordinary income tax as well as FICA and FUTA. Employers were provided with automobiles for business use and were charged a small amount for personal use of the vehicles. The IRS alleged that the actual value of personal use exceeded that charged by the company and the differential constituted wages to the employees.

The Seventh Circuit relied on this Court's decision in *Central Illinois Public Service Co. v. United States,* 435 U.S. 21 (1978), in determining that the congruence of the definition of wages for FICA, FUTA, and income tax purposes necessitated exclusion of items from FICA and FUTA wages that were excluded from income taxation.

As detailed in the "Interest of the Amici" section, *supra,* one recent case involved a factual situation similar

to that of the *amici* herein. In *Hotel Conquistador v. United States, supra,* the Court of Claims determined that the value of meals should be excluded from FICA taxation. However, the IRS issued a notice of non-acquiescence, Rev. Rul. 8041, 1980-1 C. B. 211, and continues to collect taxes from hotel and casino employees despite the court ruling. *Hotel Conquistador* held that the meals in question were not remuneration, and therefore were not wages subject to FICA and FUTA taxation. The court rejected the argument that meals were part of a "total package of remuneration" provided to employees:

> [E]ven the Treasury does not contend that every expense incurred by the employer that tends to make the job more acceptable to the employee, constitutes "remuneration" and "wages."

597 F.2d at 1352. Although the Court did not rely solely on the statutory convenience of the employer test, which is not directly applicable to FICA taxes, it did undertake a similar analysis in examining whether meals are remuneration. 597 F.2d at 1353.

The final case that the *amici* will examine in detail is this Court's decision in *Central Illinois Public Service Co. v. United States, supra.* The issue of this case was whether lunch expense reimbursements of employees who were on company travel but not away overnight, were wages for income tax withholding purposes. The Court emphasized that "wages" was a narrower concept than "income," and items that might be taxable as to the employee were not necessarily included in the employer's obligation to withhold taxes on "wages." Wages means remuneration for services performed by an employee for his employer, while many other items may be included in the term "income." 435 U.S. at 25. The Court's conclusion that lunch reimbursements were *not* included in wages for withhold-

ing purposes is directly applicable here since the definition of wages is virtually identical under all the statutes. See *Royster v. United States, supra.*

C. *Principles of statutory construction refute the Fifth Circuit's holding in this case.*

Interpretation of the term "wages" as meaning the same for FICA purposes as for income tax withholding purposes is consonant with the principles of statutory construction. It is presumed that the same words used in different parts of an act have the same meaning, and this natural presumption applies to the Internal Revenue Code unless the commissioner presents evidence to justify a departure from it. *Hotel Equities Corp. v. Commissioner,* 546 F.2d 725 (7th Cir. 1976). *See also Atlantic Cleaners & Dryers, Inc. v. United States,* 286 U.S. 427 (1932). As the Court of Claims stated in *Southern Natural Gas Co. v. United States,* 412 F.2d 1222, 1266 (Ct. Cl. 1969), "All the sections of the [Internal Revenue] Code must be read together to avoid conflict and achieve a harmonius, rational result." *Accord, Helvering v. Credit Alliance Corp.,* 316 U.S. 107 (1942). Furthermore, the Court should not be concerned with whether additional revenue will be generated in the construction of tax statutes. *Caruth v. United States,* 566 F.2d 901 (5th Cir. 1978). The virtually identical definition of wages under I.R.C. §§ 3401, 3121, and 3141, and the lack of relevant differences in purpose between the sections, lead to the conclusion that *Central Illinois'* exclusion of the value of meals should be applied to FICA and FUTA taxes.

## CONCLUSION

Many thousands of employees and employers will be affected by this Court's determination. Although the individual's tax impact is small, the cumulative effect will be significant.

For the above reasons, the employees who are *amici* herein respectfully urge this Court to reverse the decision of the Fifth Circuit Court of Appeals and eliminate confusion in the administration of the tax laws by declaring that "wages" has the same meaning for purposes of all the employment tax provisions of the Internal Revenue Code.

*Respectfully submitted,*

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